TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM [redacted] 1927

No. [redacted] 152

F. H. MASON, PETITIONER,

vs.

C. F. BOUTZAHN, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 14, 1926

CERTIORARI GRANTED JANUARY 17, 1927

(32,337)

(32,337)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 770

F. H. MASON, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, northern Ohio	1	1
Caption (omitted in printing)	1	
Petition	2	1
Praecipe for summons	5	4
Summons and marshal's return	6	4
Agreed statement of facts	7	6
Exhibit A—Income-tax return	17	15
Answer	21	15
Opinion, Westenhaver, J	22	16
Judgment	26	20
Petition for writ of error	27	21
Assignments of error	27	22
Order allowing writ of error	28	22
Writ of error	29	23

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	Original	Print
Return to writ of error.....(omitted in printing)..	30	
Citation and service.....(omitted in printing)..	31	
Orders extending time.....	33	24
Præcipe for transcript of record.....	34	25
Clerk's certificate.....(omitted in printing)..	35	
Proceedings in the United States circuit court of appeals, sixth circuit.....	37	26
Argument and submission.....	37	26
Judgment	37	26
Opinion per curiam.....	38	26
Motion for stay of mandate.....	40	29
Petition for rehearing.....(omitted in printing)..	41	
Brief in support of petition for rehearing (omitted in printing)	45	
Order staying mandate.....	57	29
Order denying petition for rehearing.....	57	30
Clerk's certificate.....(omitted in printing)..	58	
Order allowing certiorari.....	59	30

[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO

PETITION—Filed December 14, 1923

Plaintiff was at the times hereinafter stated, has continued to be and now is a resident of Akron, Summit County, Ohio.

Defendant was at the times hereinafter complained of, has continued to be and now is the Collector of Internal Revenue in and for the Eighteenth District of Ohio.

First Cause of Action

Plaintiff for his first cause of action alleges and says:

1. That before and at all times during the year 1917 plaintiff was the owner and holder of record of 22,781 shares of the common stock of The B. F. Goodrich Company, a corporation duly organized and existing under the laws of the State of New York, and doing business in the State of Ohio; and before and on January 2, 1917, he was the owner of 10,010 shares, and before and on April 1, 1917, and thenceforward throughout said year, he was the owner and holder of record of 9985 shares of the 7% preferred stock of said The B. F. Goodrich Company.

2. That before October 25, 1916, said The B. F. Goodrich Company had accumulated undivided profits or surpluses more than sufficient to pay the dividends on its common stock and on its preferred stock hereinafter referred to, the amount necessary for said purposes having been accumulated by it during the calendar year 1916. And on the following dates respectively the Board of Directors of The B. F. Goodrich Company declared upon its common stock, including the common stock held by the plaintiff, cash dividends at the rate of $1.00 per share, to-wit: On October 25, 1916, a dividend payable February 15, 1917; and on January 24, 1917, a dividend payable May 15, 1917.

And on the following dates respectively The B. F. Goodrich Company declared upon its preferred stock, including the preferred stock held by plaintiff, cash dividends at the rate of $1.75 per share, to-wit: On October 25, 1916, a dividend payable January 2, 1917; on January 24, 1917, a dividend payable April 2, 1917; and on said January 24, 1917, a dividend payable July 2, 1917. Each and all of said [fol. 3] dividend distributions upon the common stock and upon the preferred stock of said Company were made from the profits or surplus of the Company accumulated during the calendar year 1916, which profits or surplus were in each case the most recently accumulated undivided profits or surplus of said corporation, and each of said dividends constituted income which was taxable to the distributees at the rates prescribed by law for the year 1916, in which such profits or surplus were accumulated by said corporation.

And the plaintiff received from said Company as and for such dividends so declared the amounts set forth in the following summary:

Stock	Date declared	Date paid	Amount received
Preferred	October 25, 1916	January 2, 1917	$17,517.50
Common	October 25, 1916	February 15, 1917	22,781.00
Preferred	January 24, 1917	April 2, 1917	17,473.75
Common	January 24, 1917	May 15, 1917	22,781.00
Preferred	January 24, 1917	July 2, 1917	17,473.75
Total of said dividends received by plaintiff			$98,027.00

3. That in due time, and in the manner and form prescribed by the Commissioner of Internal Revenue, plaintiff made a return for the calendar year ending December 31, 1917, of his annual net income for said year upon a printed form furnished to him by defendant, all as required by the Act of Congress in such case made and provided for such year. In said return plaintiff set forth as a part of his income the amounts aforesaid received by him as dividends upon his common stock and preferred stock of The B. F. Goodrich Company, to-wit the sum of $98,027.00; and in the appropriate blanks set forth and returned therein that the same were accumulated in the year 1916, and calculated and set forth the amount of the tax thereon at the rates prescribed by the Act of Congress of September 8, 1916, being the rates and amounts prescribed by law for the

year in which such profits or surplus from which such dividends were paid, were accumulated by said corporation.

4. That subsequent to the filing of said return, and in due time the Commissioner of Internal Revenue, having before him said return, assessed against the plaintiff for the year 1917 an income tax of $7,451.38, which amount in- [fol. 4] cluded the tax upon said dividends so received from The B. F. Goodrich Company at said rates prescribed for the year 1916, which said tax the plaintiff, on presentation of bill therefor, duly paid to the Collector of Internal Revenue for said district at the times during the year 1918 as required by law.

5. That on or about the 1st day of March, 1923, the Commissioner of Internal Revenue of the United States re-examined the plaintiff's said return of income, and held and decided that the plaintiff was not entitled to return the amount of said income received as said dividends from The B. F. Goodrich Company at the rates prescribed by law for the year 1916, but was taxable thereon at the rates prescribed for the year 1917; and said Commissioner thereupon amended the plaintiff's return for said year 1917, and, except for said sum of $17,517.50 so received on January 2, 1917, re-calculated said return with respect to the taxes upon said incomes received as dividends from The B. F. Goodrich Company, on the basis and at the rates prescribed by the laws of Congress in force and effect for the year 1917, and assessed against the plaintiff on said return as so amended additional taxes because of said incomes so received by way of such dividends in the sum of $12,458.60.

6. That on the 2nd day of May, 1923 the defendant presented to the plaintiff a bill for the additional taxes assessed as aforesaid and demanded immediate payment thereof under threat that unless the same were paid the property of the plaintiff would be distrained for the collection of such tax.

7. That because of such threat of distraint, plaintiff on the 11th day of May, 1923, paid said tax to defendant under written protest, asserting the illegality of the tax, denying liability therefor, and notifying the defendant that suit would be brought against him to recover the amount so paid with interest from the date of payment.

8. That thereafter in due form the plaintiff presented to the Commissioner of Internal Revenue his claim in writing for the refund of said taxes so paid to the defendant as aforesaid, on the ground that said taxes had been illegally assessed against the plaintiff, which application for refund was rejected and denied by said Commissioner [fol. 5] of Internal Revenue on the 29th day of October, 1923.

9. Plaintiff says that by reason of the foregoing there is due plaintiff from defendant the sum of $12,458.60 with interest from May 11, 1923.

Wherefore, plaintiff prays judgment against the defendant in the sum of $12,458.60 with interest from the 11th day of May, 1923 and his costs herein expended.

Horace Andrews, S. M. Jett, Attorneys for Plaintiff.

Duly sworn to by F. H. Mason. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

PRECIPE FOR SUMMONS—Filed December 15, 1923

To the Clerk:

Please issue summons for the above named defendant, returnable according to law, and endorse same, "Action at law for money, amount claimed $12,458.60 with interest thereon from May 11, 1923, together with the costs of this action."

Horace Andrews, S. M. Jett, Attorneys for Plaintiff.

[fol. 6] IN UNITED STATES DISTRICT COURT

SUMMONS AND MARSHAL'S RETURN

Action for money only. Amount claimed: $12,458.60.
Returnable Dec. 24, 1923. Answer day: Jan. 12, 1924.
$15.00 Deposited for costs. Returned and —.
Horace Andrews, S. M. Jett, Plaintiff's Attorneys.

THE UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are Hereby Commanded to notify C. F. Routzahn, Collector of Internal Revenue for the Eighteenth District of Ohio, that he has been sued by F. H. Mason, in the District Court of the United States, within and for the Eastern Division of the Northern District of Ohio, and that unless he answers by the 12th day of January A. D. 1923, the petition of the said plaintiff against him filed in the Clerk's office of said Court, at Cleveland, in said Division and District, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 24th day of December, A. D. 1923.

Witness, the Honorable John M. Killits, and the Honorable D. C. Westenhaver, District Judges of the United States, this 14th day of December, A. D. 1923, and in the 148th year of the Independence of the United States of America.

B. C. Miller, Clerk, by C. A. Wilder, Deputy Clerk.
(Court Seal.)

Original.

[fol. 7] U. S. Marshal's Return—Filed December 26, 1923

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Cleveland, Ohio, Dec. 14, 1923 and on Dec. 17, 1923 I served the within named C. F. Routzahn personally by serving his secretary with a true copy with all endorsements thereon.

Geo. A. Stauffer, by H. D. Lingenfelter, Dep.

Marshal dues:

Service	2.00
Travel	.06
	2.06

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACTS—Filed November 29, 1924

The parties plaintiff and defendant agree to and hereby do stipulate for the purposes of this case the following facts to be true, and consent that they may constitute a part of the finding of the facts in this case without restricting either party in the introduction of further evidence.

(1) The B. F. Goodrich Company is a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact business in the State of Ohio, with its works and principal office at Akron, Summit County, Ohio. Prior to and thruout the year 1917, F. H. Mason owned and held of record 22,781 shares of the common stock of said The B. F. Goodrich Company, and prior to and until after January 2nd, 1917 said F. H. Mason owned and held of record 10,010 shares of the 7% preferred stock of said The B. F. Goodrich Company, and prior to and on April 2nd, 1917, and thenceforward he was the owner of record of 9,985 shares of said 7% preferred stock of said Company.

[fol. 8] (2) That during the year 1916 and for many years prior thereto The B. F. Goodrich Company had been actively engaged in the manufacture of rubber equipment, articles, goods, and supplies, and had earned and accumulated, and on December 31st, 1916, held, large undivided profits and surplus, the portion of which accumulated during the year 1916 was more than sufficient to pay the dividends on its common stock, and on its preferred stock, which were paid by it to its common and preferred stockholders at the times during the year 1917 hereinafter set forth, from January 2nd, 1917 to July 2nd, inclusive.

(3) That dividends were declared and paid by The B. F. Goodrich Company to the holders of its common stock, including F. H. Mason, at the rate of $1.00, per share for each dividend, as follows to-wit:

Date of Declaration	Date of Payment
October 25th, 1916.	February 15th, 1917.
January 24th, 1917.	May 15th, 1917.

and that dividends were declared and paid by The B. F. Goodrich Company to the holders of its 7% preferred stock at the rate of $1.75 per share of said stock for each such payment as follows, to-wit:

Date of Declaration	Date of Payment
October 25th, 1916.	January 2nd, 1917.
January 24th, 1917.	April 2nd, 1917.
January 24th, 1917.	July 2nd, 1917.

(4) That F. H. Mason received from said dividends so declared by The B. F. Goodrich Company the following amounts, to-wit:

On its Common Stock:

On February 15th, 1917	$22,781.00
On May 15th, 1917	22,781.00

On its Preferred Stock:

On January 2nd, 1917	$17,517.50
On April 2nd, 1917	17,473.75
On July 2nd, 1917	17,473.75

making an aggregate amount received by him from the dividends so paid by The B. F. Goodrich Company to the holders of its common stock and the holders of its preferred stock, on the dates hereinabove set forth, of $98,027.00.

[fol. 9] After July 2nd, 1917, said Company paid other dividends on its stock, but such subsequent dividends are not here involved.

(5) Prior to, and including the year 1917, approximately 75% of the Company's output was made up of rubber tires for motor vehicles. Thruout all that period closed automobiles had not come into general use, and the great majority of automobiles were open cars. A very large percentage of such cars were laid up during the winter season, so that the rubber tire business of the Company was seasonal in its nature—the large volume of such business being done with the public during the summer months. As a result, the Company, in order to maintain its production on a fairly even basis thruout

the year, had stored in its warehouses at its Akron plant a very large part of its output made during the fall, winter and spring months, and the storage of these tires required and consumed large storage space.

(6) Late in the year 1916 the officers of The B. F. Goodrich Company, believing that the United States would shortly be involved in the European war, tendered its manufacturing facilities to the Government, and the officers of the Company promptly began preparation for such war work in accordance with instructions as to the Government's probable requirements.

In order to provide such necessary manufacturing space for war supplies, and at the same time continue, so far as possible, the production of its peace-time requirements, it was decided that the space theretofore used for winter and spring storage of tires should be made available for manufacturing operations. To accomplish this, and in order to have its tires well distributed thruout the United States in case of a shortage of shipping facilities due to the war—the Company determined to make and adopt a special arrangement under which these tires could be shipped to its dealers thruout the United States. A form of special contract was adopted for the purpose of carrying out this plan, in tenor as follows:

Goodrich Automobile Tire Dealers' Memorandum of Agreement

The B. F. Goodrich Company.

GENTLEMEN: In consideration of your giving us your lowest dealers' prices on Goodrich Brand Automobile Tires and Accessories, you may enter our order for tires and [fol. 10] accessories, under the conditions set forth hereinafter:

Stock

We agree to carry in stock at all times an assortment of the goods specified herein to anticipate the needs of the car owners whom we serve.

Advertising

We agree to inform the car owners of this locality that our store is an active unit in your chain of distribution. To help us achieve this purpose, and to aid us in uniting our store with your national advertising program, we agree to place a sign furnished by you, as indicated, prominently on our place of business. (Cut of sign inserted in original contract.)

Protection

Should any downward revision in your general dealers' prices occur within one hundred and twenty (120) days from date of invoice, any unsold cases or tubes that we may have in stock are to be adjusted by you in accordance with the new and lower basis. If we find ourselves overstocked in any sizes or types of your cases or tubes at the close of the tire season, which for the purpose of this Agreement shall be the months of September and October next following execution, we are to have the privilege of returning to your store from which purchased, all transportation charges prepaid, such surplus stock for credit at the price paid, less cash discount or any other allowance applying on the purchase price as herein provided. In no case, however, will you be expected to receive or issue credit for any stock purchased by us more than six months prior to the date of return, or for stock which, in your judgment, is not in first-class salable condition. If you desire at any time to draw upon us for stock we may have on hand, we agree, on receiving written notice, to return to you promptly, transportation charges prepaid, such surplus stock in first-class salable condition under the same provisions for credit as hereinabove provided; or, failing to do so, to relinquish the privilege of returning for credit at a later date such surplus stock in the size and type called for by you.

[fol. 11]

Price Change

We understand that you reserve the full right to alter either list or trade prices and terms at any time and without prior notice, and to refuse to sell us, except for cash, whenever you are not satisfied with our responsibility.

Acceptance

Upon your acceptance in the place provided, this Agreement shall be in full force and effect, and any and all prior or contemporaneous oral or written communications, representations, or agreements, made by any person or persons for, or on behalf of your Company or ourselves, shall be merged in this written agreement, and we will not at any time assert or claim that any terms of this agreement can be or have been altered, waived or modified, except by a written endorsement thereon signed by an executive officer of your Company. We agree that all deliveries hereunder are subject to delays caused by labor disputes, interruption or shortages of transportation facilities, accidents or any causes beyond your control.

Cancellation

This agreement expires by limitation on October 31, 1917. We agree that you may cancel this agreement without notice whenever you believe that we are violating or have violated any of its provisions or are committing or have committed any act that is directly or indirectly detrimental or injurious to your interests.

Under this special contract and arrangement the great bulk of the tires manufactured from January 1st up to July 1st, 1917, were shipped out to dealers. In the meantime, by reason of the public anticipation of the declaration of war, business conditions were unsettled, and the demand for tires wholly uncertain. The total value of the delivery of tires to dealers under said agreement during the first six months of 1917 was as follows:

January	$2,426,888 32
February	2,343,696 26
March	3,876,296 60
April	2,796,442 96
May	2,772,325 06
June	3,128,726 79

[fol. 12] (7) Between July 1st and August 1st, 1917, the demand for automobile tires increased beyond the Company's previous expectations, and to meet such demand the Company increased its factory output, and in addition,

gave notice to its dealers requesting them to determine by August 15th, 1917, whether they would keep the tires shipped to them under the special contract or would release the same and permit the Company to ship them to other customers.

(8) The adjustment of the Company's manufacturing program to the preparation for war work, required the expenditure of very large sums of money; and the operating expenses for the first half of 1917 were unusually large. In order to comply with the requirements of the Government the Company found it necessary to employ experts, to prepare plans, patterns and tools of all kinds, and to train an organization made up of thousands of persons, in the work of manufacturing balloons, gas masks, and other supplies and equipment, as to which the Company had theretofore had no experience. In doing these things the Company was required to, and did, make great expenditures; and in addition to disbursing large amounts out of its receipts, it increased its bank indebtedness on demand and short term notes between January 1st and July 1st, 1917, in an amount exceeding $13,500,000—mainly for operating expenses and materials. The net increase in plant account of the Company during said six months' period was only approximately $1,336,000. More than $8,500,000 of said borrowing was during the month of June, 1917, over $5,400,000 of which was used to pay maturing notes, given during that year, and the balance of $3,180,000 being required for the current operations of the Company.

(9) After July 15th, 1917, and before December 31st of that year, The B. F. Goodrich Company operated to the limit of its manufacturing capacity, and received large incomes and profits, sufficient to pay its outstanding notes given for operating expenses before July 1st, and to pay its entire operating expenses after that time, and in addition thereto, sufficient to leave undivided surplus and profits for said year large enough in amount to more than equal the sums paid for dividends upon its common and preferred stock thruout said entire year.

(10) On January 28th, 1918 the Company caused the following notice to be sent to F. H. Mason and to all its other stockholders:

[fol. 13] Notice to Shareholders

The attention of the stockholders is called to the fact that the dividends on the preferred stock of this Company which were paid on January 2nd, 1917, April 2nd, 1917, and July 2nd, 1917, and on the common stock which were paid on February 15th, 1917 and May 15th, 1917, were declared from the net profits accumulated in the calendar year 1916, which were the most recently accumulated undivided profits of the Company.

Yours very truly, The B. F. Goodrich Company. B. G. Work, President.

(11) In due time F. H. Mason made return for the calendar year 1917 of his annual net income for said year upon a printed blank furnished to him by the Collector of Internal Revenue at Cleveland, Ohio, for that purpose, a true copy of which said return is hereto attached marked "Exhibit A". Said return was made in good faith and under advice of counsel. In making said return F. H. Mason entered therein and reported and set out in appropriate blanks and spaces, therein provided for such purpose, the income received by him by way of dividends from The B. F. Goodrich Company, and included and reported therein said dividends received on January 2nd, 1917, February 15th, 1917, April 2nd, 1917, May 15th, 1917 and July 2nd, 1917, as paid from undivided surplus and profits of the Company accumulated by it during the year 1916, and reported and thereafter duly paid the amount of the tax based upon that part of said income represented by said dividends, at the rates prescribed by law for the year 1916.

(12) Some time before the 30th day of March, 1922, a duly authorized representative of the Treasury Department proceeded to audit the books and records of said F. H. Mason in connection with his said return for said year 1917, and made the claim and reported that except the first dividend (paid on January 2nd, 1917) the entire dividends paid by [fol. 14] The B. F. Goodrich Company to F. H. Mason during the year 1917 should be deemed to have been paid from the undivided profits or surplus of the Company for the year 1917, and not from the undivided profits or surplus of the year 1916; and that, except for said sum of $17,517.50 (the

January 2nd dividend) said F. H. Mason was not entitled to pay income taxes upon the dividends received by him from The B. F. Goodrich Company during the year 1917 at the rates prescribed by law for the year 1916, but should be required to return and pay income taxes thereon at the rates prescribed for the year 1917; and said representative of the Treasury Department also recommended that certain other small amounts, not here in question, should be taxed at the 1917 rates instead of the rates prescribed for the year 1916 as reported.

(13) Thereupon, the Commissioner of Internal Revenue made certain corrections (not here in question) of Plaintiff's said return for said year, some in favor and some against this Plaintiff, as the net result of which corrections (had they been the only changes made in said return) Plaintiff would have been entitled to a refund of approximately one thousand ($1,000) dollars on account of over-payment of income taxes for said year; at the same time said Commissioner proceeded to, and did, over the objection of said F. H. Mason, amend his return for said year, relative to all the following dividends hereinbefore referred to received by him from The B. F. Goodrich Company, to-wit: the dividend on common stock declared on October 25th, 1916 and paid on February 15th, 1917, and the dividends on preferred and common stock declared on January 24th, 1917 and paid respectively on April 2nd, 1917, May 15th, 1917 and July 2nd, 1917, as to all of which said F. H. Mason had made his return on the basis that said dividends had been declared and paid from undivided profits and surplus accumulated by said Company during the year 1916, as hereinbefore stated, so as to set forth and show that, except for the amount of $17,517.50 (being the dividend paid by The B. F. Goodrich Company as hereinbefore set forth) were from accumulated undivided surplus and profits of said The B. F. Goodrich Company for the year 1917, and said Commissioner assessed the tax thereon at the rates prescribed by law for said year 1917.

Said Commissioner thereupon proceeded to, and did, over the objection of F. H. Mason, assess against said F. H. Mason additional taxes above those originally shown on his said return and paid, as herein set forth, to the amount of $12,458.60 for the year 1917, and on or about the 30th

day of April, 1923, delivered his assessment list to the Collector at Cleveland, Ohio, who on the 2nd day of May, 1923, made demand upon said F. H. Mason for payment thereof, informing said F. H. Mason that unless said payment was made within 10 days, he would issue a distraint warrant [fols. 15 & 16] and sell the property of said F. H. Mason to pay said taxes.

Said F. H. Mason on the 11th day of May, 1923, being under compulsion and duress and solely to avoid the seizure and sale of his property, paid to said Collector said taxes under protest, stating that they were being illegally assessed and giving notice to said Collector that he intended to apply forthwith to the Commissioner of Internal Revenue for refund thereof, and if such refund were denied, to institute suit against the Collector to recover the amount so paid, with interest. A claim for refund of such taxes was forthwith presented to said Commissioner, and by him on the 29th day of October, 1923, in due form was rejected.

(14) It is agreed that if, upon the execution of the special contract between The B. F. Goodrich Company and its dealers, hereinabove set forth, deliveries of tires thereunder at once became and constituted firm sales, the Company had on the dates of payment of dividends here in question profits, earned but not received, for the year 1917 equal to or in excess of the amount of said dividends; but if the deliveries under said special contract did not constitute firm sales, the Company did not have any profits for such year on the dates of the payment of the dividends here in question. The Company kept its books on an accrual basis; and it has been the custom of the Company to treat on its books the assets represented by merchandise on consignment, as accounts receivable by the Company up to and until the time of closing its books at the end of the calendar year, at which time the amount of the accounts receivable has been reduced by the amount included therein on account of stock then remaining on consignment, and the inventory of finished goods increased by the inventory value of such merchandise; and the goods shipped during the year 1917 under the special contract hereinbefore referred to were dealt with by the Company on its books in this manner.

The Company did not close its books for the years 1916

EXHIBIT "A" TO AGREED STATEMENT OF FACTS

(SEE INSTRUCTIONS ON PAGE 2 UNDER CORRESPONDING HEADINGS)

DETAILS OF TAXABLE INCOME (INCLUDING INCOME OF WIFE (OR HUSBAND) AND DEPENDENT CHILDREN, IF NOT REPORTED ON SEPARATE RETURNS)

WRITE "NONE" IN EACH BLOCK IN WHICH YOU HAVE NO INCOME TO REPORT

A. INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTORS' FEES, AND PENSIONS, AND FROM PROFESSIONS.

1. By whom received.	2. Occupation or profession.	3. Name and address of employer or (if practicing a profession) office address.	4. Gross income.	5. Deductions, if any.	
Myself	Vice Chairman	The B.F. Goodrich Co. Akron, O	$ 50,630.00	$	
"	Directorates	Various Banks & Corporations	3,500.00		
NET INCOME FROM SALARIES, ETC. (total column 4 minus total column 5)			$ 53,880.00	$	$ 53,880.00

Explanation of deductions:

B. INCOME FROM BUSINESS (INCLUDING FARMING).

Kind of business: Business address:

GROSS SALES and income from business services $

COST OF GOODS SOLD:

Labor	$		
Materials and supplies			
Merchandise bought for sale			
Other costs			
PLUS inventories at beginning of year			
TOTAL	$		
LESS inventories at end of year			
NET COST OF GOODS SOLD	$		

OTHER BUSINESS DEDUCTIONS:

Salaries and wages not reported as "Labor" under "Cost of Goods Sold"	$		
Rent			
Interest on business indebtedness			
Taxes on business and business property			
Repairs, wear and tear, and property losses. (To be explained in table at bottom of page.)			
Bad debts arising from sales (see instructions)			
Other expenses (specify)			
TOTAL OTHER BUSINESS DEDUCTIONS	$		

NET COST OF GOODS SOLD PLUS TOTAL OTHER BUSINESS DEDUCTIONS $

NET INCOME FROM BUSINESS (INCLUDING FARMING) $

Explanations:

C. PROFITS FROM SALE OF REAL ESTATE, STOCKS, BONDS, AND OTHER PROPERTY.

1. Kind of property.	2. Year acquired.	3. Name and address of purchaser	4. Sale price	5. Original cost or market value Dec. 31, 1913

NET PROFIT FROM SALES (total of columns 4 and 7 minus total of columns 5 and 6) ..... $

Explanations: .....

D. INCOME FROM RENTS AND ROYALTIES.

1. Kind of property.	2. Name and address of tenant or lessee.	3. Amount of rent and royalties.	4. Repairs, wear and tear and property losses.	5. Interest.	6. Taxes.	7. Other expenses.
		$	$	$	$	$
TOTALS		$	$	$	$	$

NET INCOME FROM RENTS AND ROYALTIES (total of column 3 minus total of columns 4, 5, 6, and 7) ..... $

Explanations: .....

E. INTEREST ON BONDS AND OTHER OBLIGATIONS OF THE UNITED STATES ISSUED SINCE SEPTEMBER 1, 1917.

1. If not received directly state name and address of partnership or fiduciary through whom received.	2. Amount of bonds or certificates.	3. Interest received on amount in excess of $1,000.	4. Indebtedness incurred for purchase of bonds or certificates.	5. Interest paid on proportionate part of such indebtedness.	6. Excess of interest paid, if any.	7. Excess of interest received, if any.
	$	$	$	$	$	$
TOTALS [Include total of column 7 (if any) in total net income on page 4. Enter total of column 6 (if any) under 7, "Other deductions," on page 4.]		$		$	$	$

F. DIVIDENDS ON STOCK OF CORPORATIONS ORGANIZED OR OPERATING IN THE UNITED STATES AND SUBJECT TO INCOME TAX.

1. If not received directly state name of partnership or fiduciary through whom received.	2. Accumulated in 1913.	3. Accumulated in 1914.	4. Accumulated in 1915	5. Accumulated in 1916.	6. Accumulated in 1917.
	$	$	$	$ 108 071 50	$ 90 780 17
TOTALS (include total of column 6 only in total net income on page 4)	$	$	$	$	$

EXPLANATION OF REPAIRS, WEAR AND TEAR (DEPRECIATION), AND LOSSES OF BUSINESS OR RENTAL PROPERTY, AND DEPLETION OF MINES, ETC.

Refer to "A," "B," or "D," above.	3. Kind of property. (If buildings, state also material of which constructed.)	3. Year acquired.	4. Cost of buildings or other property.	5. Repairs not covered by claims for wear and tear or losses.	Wear and tear (depreciation) and depletion charged off. 6. Rate.	7. Amount previous years.	8. Amount this year.	Losses not covered by insurance. 9. Cause of loss.	10. Amount of loss.
			$	$		$	$		$

9—4184

17-18

Page 4

DETAILS OF TAXABLE INCOME (Concluded)

(SEE INSTRUCTIONS ON PAGE 2 UNDER CORRESPONDING HEADINGS)

TOTAL NET INCOME FROM SOURCES A, B, C, D, E, AND F, REPORTED ON PAGE 3 1,96,165,17

G. INTEREST ON TAX-FREE-COVENANT BONDS (on which one normal tax of 2 per cent was withheld at source).	1. Gross income.	2. Deductions, if any.	
	$	$	
NET INTEREST ON TAX-FREE-COVENANT BONDS (total column 1 minus total column 2)	$	$	$

H. OTHER INCOME (including income from partnerships and fiduciaries, except that reported under E, F, and G).	1. Gross income.	2. Deductions, if any.	
Interest on bonds and other obligations of domestic and resident corporations (except as entered under G)	$	$	$
Interest on bonds of foreign countries and corporations and dividends on stock of foreign corporations			
Interest on notes, bank deposits, mortgages (except of corporations), and all other interest	1076 76		1076 76
Income thru Partnership of the Woodward Hancock Corner Co. Detroit Mich			7 [illegible] 60
I. TOTAL NET INCOME FROM ALL SOURCES			$ 99 867 53

J. GENERAL DEDUCTIONS NOT REPORTED ON PAGE 3 OR ABOVE (EXCEPT CONTRIBUTIONS—SEE N BELOW).		
Interest on personal indebtedness	$ 70 489 87	
Taxes on dwelling and personal property, and other taxes not reported above (see instructions on page 2)	3557 13	
Other deductions, except contributions (explain). Total loss of roof on Bldg from hail storm (not covered by insurance) on Business Farm	1094 90	
TOTAL GENERAL DEDUCTIONS, EXCEPT CONTRIBUTIONS		$ 25 141 50
K. TOTAL NET INCOME (WITHOUT DEDUCTING EXCESS PROFITS TAXES OR CONTRIBUTIONS) 182,746		$ 74 725 03
L. LESS EXCESS PROFITS TAXES, IF ANY, FOR 1917 (see instructions on page 1 under "Excess profits taxes")		
M. TOTAL NET INCOME (WITHOUT DEDUCTING CONTRIBUTIONS) (K minus L)		$ 74 725 03

N. CONTRIBUTIONS TO CHARITABLE ORGANIZATIONS, ETC. (Enter below name and address of each organization and amount paid to each.)

Smith College Northampton Mass	70	00	00	$	
Hospital at Akron	7	50	00		
TOTAL (not to exceed 15 per cent of item M)					77 411 98
O. TOTAL NET INCOME ON WHICH INCOME TAX IS TO BE COMPUTED (M minus N)					$ 47 313 05

INDIVIDUAL INCOME TAX RETURN FOR CALENDAR YEAR 1917

Read all instructions. $ 2,458.60
Answer all questions. $ 1.8
If necessary, ask your Collector of Internal Revenue for assistance. LIABILITY & DUCED $

Made by (or for) (Write plainly. Give name in full.) F. H. Mason 2340477 Ohio 3/24/23

Home address 115 So Union St (Street and number or rural route) Akron (Post office and State.) Ohio

(IF NAME AND ADDRESS ARE FILLED IN AND EITHER IS INCORRECT, PLEASE CORRECT IT.)

RECEIVED — LIST — Number — Page — Line — Audited by

1. Did you make a return for 1915? Yes
2. If so, what address did you give on the return?
3. To what Collector's office was it sent? Cleveland O. (Give district or city and State.)
4. Were you on December 31, 1917, married and living with wife (or husband)? Yes
5. If not, were you head of a family as defined in instructions on page 1 under "Personal Exemption"?
6. How many dependent children under 18 (or mentally or physically incapacitated for self-support) had you on December 31, 1917?
7. If you had a family without dependent children, what was the relationship of those dependent upon you? Wife
8. Did your wife (or husband) or dependent children derive income from sources independent of you? Yes
9. If so, is such income included in this return? No
10. If not, was such income from a separate estate?
11. If a separate return has been made by (or for) wife (or husband) or dependent child, give full name and address entered at head of that return Mrs F. H. Mason 115 S Union St
12. If income of $800 or more received by wife (or husband) or dependent child is included in this return, give full name of each such person, and also address if different from that given at the head of this return
13. What address other than that previously entered on this return did you give to employers or other persons, firms, or corporations who paid you $800 or more income during 1917?
14. Is this return made from books or records kept by you in the ordinary course of business?
15. If so, were such books or records audited by a public accountant?
16. [illegible]
17. Is this return based on that accountant's report?

18. Total net income on which income tax is to be computed (item O)	$ 11	313	85		
19. Less: Excess of interest received on obligations of United States issued since Sept. 1, 1917 (item E, total of column 7)					
20. Dividends (item F, total of column 6)		90	780	17	
21. Personal exemption (see instruction 5, page 1)			2000	00	
22. Total of items 19, 20, and 21		$ 92	780	17	
23. Balance (item 18 minus item 22)		$	None		
24. Add excess of interest paid on indebtedness incurred for purchase of obligations of United States issued since Sept. 1, 1917 (item D, total of column 6)					
25. Amount subject to normal tax of 2 per cent under act of Oct. 3, 1913		$			
26. Less additional exemption			2 000	00	
27. Amount subject to normal tax of 2 per cent under act of Sept. 8, 1916		$	None		

28. Normal tax of 2 per cent on amount of item 26	$	None	
29. Additional normal tax of 2 per cent on amount of item 27			
30. Total normal tax		None	
31. Less tax withheld on tax-free covenant bonds (2 per cent of net total of Item G)			
32. Balance of normal tax due	$	745	38
33. Surtax (see table on page 2)		1	77
34. Excess profits tax at rate of 8 per cent (see instruction 7, page 1)			
35. Excess profits tax on income from business with invested capital, as computed on excess profits tax return (Form 1101)			
36. Total of items 32, 33, 34, and 35	$	1	77
37. Additional assessments and penalties (if any) 1916 Div	$		38

Deficiency — Penalty — Basis — Tax — Page — Line

I swear (or affirm) that this return, including the accompanying schedules (if any), to the best of my knowledge and belief, is a true and complete statement of all taxable gains, profits, and income received by (Enter "me" or name of person for whom return is made.) during the year 1917, and that (Enter "I am," "he is," or "she is.") entitled to all deductions and exemptions entered or claimed hereon.

(If returns made by an agent, the reason therefor must be stated on this line.)

Sworn to and subscribed before me this 27 day of March, 1918

Walter L. Means Notary Public (Signature.) (Title.)

Summit County Ohio

F. H. Mason (Signature of individual or agent.)

(Address of agent.)

7/10/22

-2

19-20

and 1917 until the end of the calendar year, as of which time for each year its books of account were made to correctly show the condition of its business and its earnings and profits for the year in question.

Horace Andrews, S. M. Jett, Attorneys for the Plaintiff. A. E. Bernsteen, Attorney for the Defendant.

(Here follows Exhibit "A" to Agreed Statement of Facts, marked side folio pages 17 & 18 and 19 & 20.)

[fol. 21] In United States District Court

Answer—Filed December 19, 1924

Now comes A. E. Bernsteen, United States Attorney for the Northern District of Ohio, and for answer to the above entitled cause of action says that he is the legal representative of C. F. Routzahn, Collector of Internal Revenue for the Eighteenth District of Ohio, the defendant aforesaid, in all matters officially arising under and regarding the cause of action alleged in the petition, and further answering admits that C. F. Routzahn is and was at all times named in the petition the Collector of Internal Revenue for the Eighteenth District of Ohio, and that plaintiff was at all times named in the petition a resident of Akron, Summit County, Ohio, in said District.

Further answering the said defendant, C. F. Routzahn, Collector of Internal Revenue for the Eighteenth District of Ohio, denies each and all of the allegations of the plaintiff's petition herein, adverse to the interest of the said defendant, or the United States of America.

Wherefore, defendant prays that said petition be dismissed and that he go hence without costs.

A. E. Bernsteen, United States Attorney.

Duly sworn to by C. F. Routzahn. Jurat omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed July 2, 1925

WESTENHAVER, District Judge:

This is an action to recover back taxes paid under protest on dividends received on stock held in the B. F. Goodrich Company. Parties have waived in writing jury trial. All jurisdictional requirements have been satisfied. The evidence consists exclusively of an agreed statement of facts in writing, which is approved and adopted as my findings of fact.

Plaintiff owned and held both common and preferred stock during the years 1916 and 1917. On October 25th, 1916, the corporation declared on its common stock a dividend of $1.00 per share, payable February 15th, 1917, and another dividend on its common stock, of $1.00 per share, January 24th, 1917, payable May 15th, 1917. On October 25th, 1916, it declared a dividend of $1.75 per share on its preferred stock, payable January 2nd, 1917, and on January 24th, 1917, it declared two dividends of $1.75 per share on its preferred stock, payable one-half April 2nd, 1917, and the other half July 2nd, 1917. The dividend on the preferred stock declared October 25th, 1916, and payable January 2nd, 1917, was not included in Plaintiff's tax assessment or paid. All the other dividends were included, and the tax levied and assessed thereon at the 1917 rate. It is Plaintiff's contention that the applicable rate is that obtaining in 1916, and not the rate obtaining in 1917.

The solution of this dispute turns on the proper interpretation and construction of Section 31, added October 3rd, 1917, to the Revenue Act of 1916. This section was considered and conclusion announced in Douglas vs. Edwards (2 CCA. 298 Fed. 229). When this case was argued, it was represented that the United States Supreme Court would shortly thereafter, in April last, hear arguments in that case on review, and counsel were later advised that I would hold up the decision of the instant case until an opinion was announced by that court. It has, however, now adjourned until October, without any pronouncement having been made, and upon consideration of the interests

involved, I deem it my duty to announce my own conclusion without further delay.

If Douglas vs. Edwards is correctly decided, Defendant concedes Plaintiff is entitled to judgment. In my [fol. 23] opinion, Douglas vs. Edwards may be reversed, and Plaintiff will still be entitled to judgment. In that case the dividends in question were declared part late in September, 1917, and the remainder in December, 1917. The corporation, on declaring the dividend, announced that it was a distribution of accumulated undivided profits or surplus for the year 1916 and prior years. It appears, however, that there were ample current earnings and income accruing in the calendar year 1917, and prior to the declaration of dividends, out of which such distribution could have been made. This being so, there was presented the exact question which Defendant's counsel present to me for decision in this case, but the facts in this case have a distinctly different aspect.

Here, part of the dividends were declared in October, 1916, the remainder were declared as early as January 24th, 1917. It is true the earliest payment was February 15th, 1917, and the latest July 2nd, 1917. The corporation, on making these declarations of dividend, recited and announced that they were a distribution of accumulated and undivided profits and surplus accruing during the year 1916. It seems to me that this declaration is the only inference which may be legitimately drawn from the agreed facts.

The section in question is quoted in full in Douglas vs. Edwards. The important language is in substance this: Any distribution made to the shareholders of corporations in the year 1917 shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed for the years in which such profits or surplus were accumulated by the corporation. First, it is a distribution made by a corporadivided. Second, the distribution is from accumulated undivided profits or surplus. Third, it shall be included in the annual income of the shareholder for the year in which

received. And fourth, it shall be taxed to the distributee, not at the rates prescribed for the year in which received by the distributee, but at the rates prescribed for the years in which such profits or surplus were accumulated. "Earnings or profits," as is pointed out in Douglas vs. Edwards, appears six times in the same Act, whereas "most recently accumulated undivided profits or surplus" appears only in the connection above stated. The difference in language [fol. 24] is so distinct as to evidence a difference in meaning. This however, is not the strongest consideration. Section 31 distinguishes between the year in which the shareholder receives payment of the income and the year in which the corporation shall have accumulated undivided profits or surplus. The shareholder is to include it as a part of his annual income for the year in which it is received. It is to be taxed, however, at the rate prevailing during the year in which it was accumulated. Obviously, therefore, a distinction is made not only between earnings or profits and accumulated undivided profit or surplus, but also between distribution by the corporation and receipt of the sum distributed, by the shareholder. As applied to the facts of the instant case, this last consideration seems to be controlling.

A distribution by the corporation to the shareholders takes place when the declaration of the dividend is made, and not when the dividend is paid. The amount of the dividend, after the declaration, becomes the property of the shareholder. As between him and the corporation, the relation of debtor and creditor as to such dividend is at once created. If, after the declaration and before the payment, the shareholder dies or sells his shares, the dividends, in the absence of any stock report board rule or by-law to the contrary, passes to the executor or the purchaser. It is, in substance, a debt due from the corporation, payable in the future at the date specified. These principles are well settled and have been applied to dividends declared under the Income Tax Act of October 3rd, 1913, making the effective date of distribution the date the dividend was declared, and not the date when it was paid. See United States vs. Guinzburg (2 C. C. A.) 278 Fed. 363; Plant vs. Walsh (D. C.) 280 Fed. 722. In addition thereto,

it is familiar law that a corporation cannot lawfully declare a dividend except from accumulated undivided profits or surplus in existence at the time such declaration is made. It is customary, if not essential, that the existence thereof shall have been ascertained by some form of profit and loss statement. This profit and loss statement should show, carried into the surplus or undivided profits, the earnings previously made.

All of these principles must have been within the knowledge and cognizances of the law makers when they phrased Section 31. It is not necessary to go the length of Doug-[fol. 25] las vs. Edwards in construing the language "accumulated undivided profits or surplus," but it is essential that the undivided profits or surplus should at least have been susceptible of ascertainment, and of being carried into a profit and loss statement, if one had been made. Upon the facts agreed, no undivided profits or surplus had or could be accumulated in this sense, even if some had been earned after January 1st, 1917, and prior to January 24th, 1917. According to the law, and the customary principles of corporate management, the dividend declaration of January 24th must have been made on the basis of a profit and loss statement closed not later than the first of that month. If, therefore, distribution by the corporation, within the contemplation of Section 31, means the declaratory distribution made by the corporation, as distinguished from the receipt of the dividend when actually paid, by the shoreholder, it follows that the dividends now in controversy must be a distribution of accumulated undivided profits or surplus for 1916.

I am content to dispose of this case on this ground: I agree that the word "deemed" is to be taken in the sense of "conclusively presumed." If there are or have been accumulated undivided profits or surplus before the distribution is declared or, in other words, made, it will be conclusively presumed against the shareholder that the distribution is from those most recently accumulated; but it is essential that the existence of accumulated undivided profits or surplus should be shown. In this case the showing is to the contrary, and it is not necessary, in order to support this showing, that a finding should be made upon the question of law and fact propounded in the last paragraph

of the agreed statement of facts. It may be, as is contended by Defendant, the tire sales under the facts agreed were what in law is known as a sale or return, and not a bailment, or a consignment. Even so, the showing is conclusive that on January 24th, 1917, when the last dividend was declared i. e., when the last distribution was made, there could not have been in existence accumulated undivided profits for any period later than the year 1916.

Due consideration has been given to the conflicting decisions of Douglas vs. Edwards (D. C.) 287 Fed., reversed by the Second Circuit Court of Appeals; Harder vs. Irwin (D. C.) 285 Fed. 402. In the main, I agree with the reasoning of the Second Circuit in reversing those decisions. In [fol. 26] my opinion, the District Courts above ignore the well settled rule that in statutes levying taxes, all doubts inhering therein must be resolved against the Government and in favor of the taxpayer. United States vs. Merriam, 263 U. S. 179; Gould vs. Gould, 245 U. S. 151.

Judgment will be rendered for Plaintiff for amount prayed in the petition.

D. C. Westenhaver, Judge.

July 2, 1925.

In United States District Court

Judgment—Entered September 18, 1925, by D. C. Westenhaver, Judge

This cause came on for trial before the Honorable D. C. Westenhaver, District Judge, the parties having duly stipulated that said case should be tried before the Court without a jury, and was submitted upon the pleadings and on an agreed statement of facts stipulated between the parties and filed herein; and the Court, being fully advised in the premises, do find the issues in this case in favor of the plaintiff, and that the plaintiff is entitled to have and recover of and from the defendant the sum of Twelve Thousand Four Hundred Fifty-eight and 60/100 Dollars ($12,458.60), with interest thereon at six per cent. (6%) per annum, from May 12, 1923, together with the costs and disbursements of this action.

Now, Therefore, it is ordered and adjudged that the plaintiff recover from the defendant the sum of Twelve Thousand Four Hundred Fifty-eight and 60/100 Dollars ($12,458.60), with interest thereon at six per cent. (6%) per annum from May 11, 1923, to the date of entry of this judgment, amounting in all to the total sum of Fourteen Thousand Two Hundred Two and 72/100 Dollars ($14,202.72), together with his costs and disbursements herein.

[fol. 27] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed December 8, 1925

To the Honorable D. C. Westenhaver, Judge of the District Court aforesaid:

Now comes A. E. Bernsteen, United States Attorney for the Northern District of Ohio, Eastern Division, representative of C. F. Routzahn, Collector of Internal Revenue for the Eighteenth Internal Revenue District of Ohio, and respectfully shows that on the 18th day of September, A. D. 1925, the above-named District Court entered a judgment herein in favor of the plaintiff and against the defendant to the prejudice of the defendant.

The defendant herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the Sixth Circuit, under the laws of the United States in such cases made and provided.

Wherefore, premises considered your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at Cincinnati, Ohio, in said Circuit for the correction of the errors complained of and herein assigned, be allowed and that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

A. E. Bernsteen, Attorney for Petitioner.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed December 8, 1925

Comes now the defendant in the above-entitled cause, Carl F. Routzahn, as Collector of Internal Revenue for the Eighteenth District of Ohio, and presents to the Court his assignments of error which he alleges were committed in the trial and procedings in the above cause to his prejudice and injury as follows:

[fol. 28] 1. The court erred in holding that dividends received by the plaintiff during the year 1917 from the B. F. Goodrich Company, after that paid to him on January 2, 1917, should be taxed for Federal income taxes at the rates prescribed for the year 1916.

2. The court erred in not holding that the phrase "most recently accumulated undivided profits or surplus," as used in subdivision (b) of section 31 of the Revenue Act of October 3, 1917, included current earnings of the B. F. Goodrich Company during the year 1917, and that the dividends received by the plaintiff during the year 1917, subsequent to that received by him on January 2, 1917, were paid out of undivided profits or surplus of the year 1917 and were taxable for Federal income taxes at the rates prescribed for the year 1917.

3. That the finding is not sustained by law.

4. The court erred in giving judgment for the plaintiff.

5. The court erred in not giving judgment for the defendant.

A. E. Bernsteen, United States Attorney.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Entered December 8, 1925, by Paul Jones, Judge

This day came the defendant, by A. E. Bernsteen, United States Attorney for the Northern District of Ohio, and filed herein and presented to the Court its assignment of errors

and petition for allowance of writ of error intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error.

[fol. 29] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed December 8, 1925

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between F. H. Mason, as plaintiff, and C. F. Routzahn, Collector of Internal Revenue for the Eighteenth District of Ohio, as defendant, a manifest error hath happened, to the great damage of said C. F. Routzahn, Collector of Internal Revenue for the Eighteenth District of Ohio, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 7th day of January

*Not exceeding 30 days from the day of signing the citation.

next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and fiftieth.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, by F. J. Denzler, Deputy Clerk. (Seal.)

[fol. 30] Allowed by Paul Jones, Judge of the District Court.

Return to writ of error omitted in printing.

[fols. 31 & 32] Citation, in usual form, showing service on Horace Andrews, omitted in printing.

[fol. 33] In United States District Court

Order Extending Time—Entered December 30, 1925, by Paul Jones, Judge

On application of defendant and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Circuit Court of Appeals be extended to February 6, 1926.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—Entered February 6, 1926, by Paul Jones, Judge

On application of defendant and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Circuit Court of Appeals be extended to March 8, 1926.

[fol. 34] IN UNITED STATES DISTRICT COURT

PRECIPE FOR TRANSCRIPT OF RECORD—Filed December 8, 1925

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause and include therein the following papers, orders and documents:

Petition.
Summons.
Answer.
Agreed Statement of Facts.
Memorandum opinion of Court.
Judgment.
Petition for Writ of Error.
Assignment of Errors.
Allowance of Writ of Error.
Writ of Error.
Return on Writ of Error.
Citation in Error.
Precipe.
Orders extending time for filing transcript of record.

And deliver all papers to The Gates Legal Publishing Company for printing.

A. E. Bernsteen, Attorney for Defendant.

[fols. 35 & 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] In the United States Circuit Court of Appeals for the Sixth Circuit

Argument and Submission

(June 11, 1926—Before Denison, Donahue, and Moorman, JJ.)

This cause is argued by Mr. Charles T. Hendler, Special Attorney, Bureau of Internal Revenue, for the Plaintiff in Error, and by Mr. Horace Andrews, for the Defendant in Error, and is submitted to the Court.

In United States Circuit Court of Appeals

Error to the District Court of the United States for the Northern District of Ohio

Judgment—Filed June 30, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with directions to enter judgment for defendant.

[fol. 38] In United States Circuit Court of Appeals

Before Dension, Donahue, and Moorman, Circuit Judges

Opinion—Filed July 10, 1926

Per Curiam:

Since this case was decided below, the Supreme Court's opinion in Edwards v. Douglas has appeared—(269 U. S. 204). While upon its facts the present case can be distinguished from that one, yet we conclude that the general view of the purpose and construction of the law there stated

by Mr. Justice Brandeis must be applied here; and this leads us to a reversal of the judgment below.

The corporate dividends which came to Mason and formed the basis of this tax, were declared near the end of 1916 and were made payable and were paid at various dates in 1917, from February until July. They are returned by Mason as a part of his 1917 income; and the question is whether the 1916 or 1917 taxing rates should be applied. The statute (Sec. 31 b, Revenue Act of October 3, 1917) for the purpose of attaching the taxing rate to dividends, imperatively specifies that "any distribution made by a corporation to its shareholders * * * shall be deemed to have been made from the most recently accumulated undivided profits or surplus." The court below concluded that the "distribution" was made when the dividend was declared, segregated from the body of undivided profits and became a debt from the company to the stockholder which he could sell independently of the stock. That, as between the stockholder and the corporation and from many points of view, such a declaration is a distribution of profits, is indisputable; but this is a taxing statute, the dominant thought of which is that the citizen should suffer an annual burden upon his annual current income. "Distribution" must mean a disposition which at that moment results in income; because to ascertain taxable income is the purpose and subject matter of the act, and a dividend declared this year, payable in the next or some more distant year, is not within the normal conception of income for this year. Though the legal duty to pay is fixed [fol. 39] by such a declaration, it is commonly recognized that actual and prompt payment is contingent upon the continuance of expected conditions. Books might be kept upon an accrual basis, so as to show such items as becoming income upon declaration, but they would have to be discounted to their present worth, and this can hardly be the normal method of treatment which Congress should be deemed to have had in mind. Indeed, it appears that Mason did not treat these items as part of his 1916 income, and his conduct serves to indicate that he did not understand when he made his return for 1916, that any income had been distributed to him during that year by this declaration. Upon the whole we are satisfied that, in

the environment of this statute, "distribution made" means "dividends paid."

This brings us to the phrase "most recently accumulated" profits. This may refer to any one of three kinds of profits. First, those which at the time of the dividend payment have been formally recognized and entered on the books as profits for a fixed period, and are normally destined to be paid out in dividends; second, those which in fact have then come into existence but have not been ascertained or stated on the books; third, those which are finally ascertained and entered as the profits for the entire year during which dividends are paid. The first construction must be rejected on the authority of Edwards v. Douglas. The second is logically permissible, but is impracticable. Not only may profits seeming to exist in July disappear before the end of the year, but it is often, if not typically, humanly impossible to determine with any accuracy in what months of the year the profits were made. To attempt to administer the law upon this theory would bring endless and hopeless confusion and disputes. A meaning which would inevitably make the law most difficult of application and in large degree unworkable ought not unnecessarily to be attributed to Congress.

The third construction can not be spelled out in the very words of the law; but if the entire taxing year should be taken as a unit, as Justice Brandeis says should be done (probably as applied here meaning 1917), it is seen that when the return was made in March, 1918, the tax payer [fol. 40] knew that profits had been accumulated in 1917 from which all 1917 dividends could be paid; and it is not unreasonable to suppose that the "most recently accumulated profits" are to be judged from the end of the fiscal year during which the income was received. We see no other construction which will furnish a common yardstick by which the tax can be measured in all cases; and we conclude that the principle on which Edwards v. Douglas was decided requires us to adopt this third construction.

It results that the judgment below must be reversed. Upon this record there should have been a judgment for defendant; and since the rule of the Slocum Case, 228 U. S. 364, depends upon the right to a jury trial, and in the present case a jury was waived and the facts agreed upon,

we can, and do, now direct that judgment to be entered by the District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION TO STAY MANDATE—Filed July 21, 1926

Now comes the defendant in error, F. H. Mason, and represents to the Court that steps are being taken to file a petition in the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court in the above entitled action.

The defendant in error therefore prays that this court will by its order stay the sending down of its mandate to the District Court for the Northern District of Ohio, Eastern Division.

Horace Andrews, Counsel for F. H. Mason, Defendant in Error.

[fols. 41-56] Petition for rehearing and brief in support thereof, covering 15 pages, filed August 7, 1926, omitted from this print. It was denied and nothing more by order October 7, 1926.

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed October 7, 1926

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari, is hereby granted subject to the following condition; the applicant shall within thirty days from the date of this order file petition for the writ in the Supreme Court, give the notice to opposing counsel required by Supreme Court Rule 35 and file in this court proof of such filing and notice. Unless this condition is complied with, the mandate herein will issue either upon the court's own motion and without notice, or upon motion of opposing party upon notice, as to the court may seem best; but in the event of such compliance the mandate will be stayed until final action in the case is taken by the Supreme Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Filed October 7, 1926

The petition for rehearing of this cause is hereby denied.

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 17, 1927.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.